

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WASHINGTON**

THE ESTATE OF CINDY LOU HILL, by  
and through its personal representative,  
Joseph A. Grube; and CYNTHIA  
METSKER,  
individually,

Plaintiffs,

vs.

NAPHCARE INC., an Alabama  
corporation; HANNAH GUBITZ,  
individually; and SPOKANE COUNTY, a  
political subdivision of the State of  
Washington.

Defendants.

**NO. 2:20-cv-00410-MKD**

**DEFENDANT SPOKANE  
COUNTY'S PROPOSED  
INSTRUCTION REGARDING  
PLAINTIFFS' SPOILIATION  
MOTION AND MEMORANDUM  
IN SUPPORT**

**PROPOSED INSTRUCTION**

Plaintiffs contend that Spokane County at one time possessed a video recording from a camera located in the hallway outside Cell 2W27 in the Spokane County Jail covering the period from 9:43 a.m. to 4 p.m. on August 25, 2018. Spokane County contends that the loss of this videorecording was unintentional and not done to deprive Plaintiffs of the use of the information in the litigation.

You may assume that such evidence would have been unfavorable to Spokane County only if you find by a preponderance of the evidence that Spokane County acted with the intent to deprive Plaintiffs of the information's use in the litigation.

7<sup>th</sup> Cir. Model Civil Jury Instructions, 1.20 (2017) modified; Fed. R. Civ. P. 37(e)(2).

**DEFENDANT SPOKANE COUNTY'S PROPOSED  
INSTRUCTION REGARDING PLAINTIFFS'  
SPOILIATION MOTION AND MEMORANDUM IN  
SUPPORT – 1**  
**Cause No.: 2:20-cv-00410-MKD**

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## MEMORANDUM IN SUPPORT OF INSTRUCTION

If the Court rules that the jury will be instructed on the issue of the video in question, Spokane County proposes the above instruction, which leaves the issue of determining whether or not there was spoliation of evidence with the requisite intent to the jury, incorporating the standard of Fed. R. Civ. P. (“Rule”) 37(e)(2). The finding of intent must be made before an adverse inference can be drawn.

The 9<sup>th</sup> Circuit Model Civil Jury Instructions do not contain a spoliation instruction. Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit (2017 Ed., Last Updated September 2021). Nor could counsel for Spokane County find an instruction used by a court in an analogous situation. This is not surprising because cases considering sanctions based on spoliation are so fact specific, and instructions are similarly case specific and usually of little value outside the specific case wherein it is used. *See*, Shira A. Sheindlin and Natalie M. Orr, *The Adverse Inference Instruction After Revised Rule 37(e): An Evidence-Based Proposal*, Fordham Law (“Yet judges have substantial flexibility in selecting the language to employ, and the effects of different instructions may vary dramatically. Even the permissive inference can take multiple forms, prompting one commentator to opine that “[n]early fifty shades of adverse inference instructions have emerged.”)

The above instruction is based on a 7<sup>th</sup> Circuit model instruction. 7<sup>th</sup> Cir. Model Civil Jury Instructions, 1.20 (2017). The 7<sup>th</sup> Circuit model instruction is as follows:

### 1.20 SPOLIATION/DESTRUCTION OF EVIDENCE

[Party] contends that [Other Party] at one time possessed [*describe evidence allegedly destroyed*]. However, [Other Party] contends that [*evidence never existed, evidence was not in its possession, evidence was not destroyed, loss of evidence was accidental, etc.*].

You may assume that such evidence would have been unfavorable to [Other Party] only if you find by a preponderance of the evidence that:

**DEFENDANT SPOKANE COUNTY’S PROPOSED  
INSTRUCTION REGARDING PLAINTIFFS’  
SPOLIATION MOTION AND MEMORANDUM IN  
SUPPORT – 2  
Cause No.: 2:20-cv-00410-MKD**

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1 (1) [*Other Party*] intentionally [destroyed the evidence] [caused the  
evidence to be destroyed]; and

2 (2) [*Other Party*] [destroyed the evidence] [caused the evidence to be  
3 destroyed] in bad faith.

4 The modification of this instruction is based on the standard set for in Rule 37(e)(2) –  
5 requiring that the “party acted with the intent to deprive another party of the information’s use  
6 in the litigation” rather than with “bad faith.” That is the standard that must be met for the  
7 jury to consider that the evidence was unfavorable to Spokane County. *See, e.g., Mannion v.*  
8 *Ameri-Can Freight Sys. Inc.*, CV-17-03262-PHX-DWL, 2020 WL 417492, at \*5–6 (D. Ariz.  
9 Jan. 27, 2020):

11 Rule 37(e) was “completely rewritten” in 2015 to “provide[ ] a nationally uniform  
12 standard for when courts can give an adverse inference instruction, or impose  
13 equally or more severe sanctions, to remedy the loss of ESI.” S. Gensler, 1 Federal  
14 Rules of Civil Procedure, Rules and Commentary, Rule 37, at 1070 (2018).  
15 Notably, a court cannot rely on its inherent authority or state law when deciding  
16 whether sanctions based on the loss of ESI are appropriate—the standards  
17 supplied by Rule 37(e) are exclusive. *Id.* at 1073 (“[The current version of Rule  
37(e)] ‘forecloses reliance on inherent authority or state law to determine when  
certain measures should be used.’ If the court cannot make the findings necessary  
to act under subdivisions (1) or (2), then the court may not invoke inherent  
authority or state law to take those measures.”)

18 This Court has expressed concern that any instruction given on the issue of alleged  
19 spoliated evidence should not prejudice co-defendants NaphCare and Hannah Gubitz. The  
20 above proposed instruction allows counsel for NaphCare and Nurse Gubitz to argue to the Jury  
21 that any adverse inference can *only* be used against Spokane County because that is what the  
22 instruction in fact says.

24 By providing language that the Court could consider for an instruction, Spokane County,  
25 as set forth in prior briefing, is not conceding that an instruction should be given.

1 DATED this 30<sup>th</sup> day of March, 2022.

2  
3 LAW, LYMAN, DANIEL,  
KAMERRER & BOGDANOVICH, P.S.

4 /s/ John E. Justice

5 John E. Justice, WSBA No 23042  
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**DEFENDANT SPOKANE COUNTY'S PROPOSED  
INSTRUCTION REGARDING PLAINTIFFS'  
SPOILIATION MOTION AND MEMORANDUM IN  
SUPPORT – 4  
Cause No.: 2:20-cv-00410-MKD**

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**CERTIFICATE OF FILING & SERVICE**

I certify under penalty of perjury under the laws of the United States of America and the State of Washington that on the date specified below, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which constitutes service on the following under LCivR 5(b):

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DATED this 30<sup>th</sup> day of March, 2022, at Tumwater, WA.

*/s/ Tam Truong*

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Tam Truong  
Assistant to John E. Justice